INDEX

	Page
Introduction	1
Counterstatement of the Question Presented	1
Reasons for Denying the Writ	2
1. Evidence of Bad Faith Bargaining by the Kellwood Company is Overwhelming	2
2. The Petition Misrepresents Important Aspects of These Proceedings	6
Conclusion	9

TABLE OF AUTHORITIES

Kellwood Co., Ottenheimer Division v. NLRB, 411 F. 2d 493 (8th Cir. 1969)	8
NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949)	5
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)	4
Sweeney & Co. v. NLRB, ... F.2d ..., 76 L.R.R.M. 2321 (5th Cir. 1971)	8
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)	2

No. 1291

SUPREME COURT OF THE UNITED STATES

October Term, 1970

KELLWOOD COMPANY, OTTENHEIMER DIVISION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Respondents*

Brief for International Ladies' Garment Workers' Union, AFL-CIO, in Opposition to a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

INTRODUCTION

The respondent International Ladies' Garment Workers' Union adopts the statements of Opinions Below, Jurisdiction, Statute Involved, and Statement set forth in the Brief for the National Labor Relations Board in Opposition.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether this Court should review a factual determination of the National Labor Relations Board that the employer bargained in bad faith and with a fixed in-

tention to obstruct rather than to reach agreement with the union, where the Court of Appeals concluded not merely that there was substantial evidence to support that determination bŭt that it "is difficult in judicial hindsight to avoid any conclusion other than the one reached by the Board."

REASONS FOR DENYING THE WRIT

1. Evidence of Bad Faith Bargaining by the Kellwood Company is Overwhelming.

As the Trial Examiner, the National Labor Relations Board, and the United States Court of Appeals all recognized unanimously, there is massive evidence in these extensive proceedings which compels a finding of bad faith bargaining by the petitioner Kellwood Company.

This is not a case in which the Court of Appeals merely deferred to the expertise of the NLRB, or felt constrained by the substantial evidence standards of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The opinion of the court demonstrates much more: a repeated conviction that the Board was right in coming to its broad (and detailed) conclusions.

> We have little difficulty with this record in holding that there exists sufficient evidence to sustain the Board's finding of § 8(a)(5) bad faith. A9.
>
> . . . .
>
> We have no difficulty on this record in resolving that there have been violations of § 8(a)(1), (3) and (5), more fully described by the Board, and that the Board's order should be enforced as herein modified. A10.
>
> . . . .

> It is difficult in judicial hindsight to avoid any conclusion other than the one reached by the Board. There existed obvious [Kellwood] strategy to force a "collision course" and obstruct bargaining. The company succeeded in what it set out to do. A11.

With amply supported conclusions of this kind by every tribunal in this case as background, it is manifest that there is substantial evidence on the record as a whole to justify the order of the NLRB.

It is not easy to abstract concise facts from thousands of pages of testimony and exhibits for the limited function of this opposition. What is present here, in sum, is employer bad faith characterized by the hostility of the 1930s and applied with the sophistication of the 1960s.

The record is replete with evidence of employer statements making plain to the employees that selection of a union would not—and could not—result in a collective bargaining agreement. See, *e.g.*, A24-A36. A pre-bargaining speech by a major Kellwood official declaimed, for example:

> The truth is—if the union should be voted in, the Company would be required to bargain with the union, but the Company would NOT be required to agree to any union demand. The Company still would not have to sign the union's contract. The Company could still say NO to the union. If no agreement was reached, there would be no contract.
>
> . . . .
>
> One other thing—ask the union what happens to employees when they vote for the union in an election and then the company and the union *never* reach an agreement and *never sign* a contract. G.C. Ex. 114. (Emphasis in original.)

However correct as sterile statements of the law such announcements might be, when they are repeatedly stated and interspersed with threats, promises, and interrogation which violate Section 8(a)(1) of the Act (see, *e.g.*, A91-A92), they clearly contribute to substantial evidence of a bad faith state of mind.

Such campaign was conducted by employer officials from the President of Kellwood to first line supervisors: selection of the union will surely result in failure to agree on a contract, which will surely result in a strike, which will surely result in loss of jobs for employees.

It was true. Selection of the union did result in failure to agree on a contract, a strike, and, without the Board decision in this case, loss of jobs for the employees. The no-contract "predictions" became reality by the conduct of the employer at the bargaining table. *Cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

At each juncture of the relationship, calculated employer acts destroyed possibility of agreement. There was appearance of conviviality, for example, in informal meetings between the top negotiators for the parties during June and July, 1966. Isolation of the major issues, traditionally a preclude to agreement, began. But the employer made sure the union could not come to agreement by (1) deciding in May to offer a critical ten cent wage increase for the Little Rock Kellwood plant, (2) announcing it on July 18 to employees at all the rest of its 36 plant chain (all nonunion), and (3) *then* "offering" it to the union for the Little Rock plant in issue. See *e.g.*, A48-A57.

There is nothing wrong, on the face of it, with giving increases at nonunion plants. There is nothing in the law that requires an employer to offer unionized employees more than nonunion employees. But the sequence of this May-July conduct by Kellwood could not have been developed with more cunning disparagement. By the sim-

plest procedure: offering the ten cents to the union at the bargaining table *before* announcing its August 1 effectiveness at the nonunion plants, for example, the status of the union as a bargainer would not have been so impaired.

Similarly, when the union was able to build back from this undercutting (see, *e.g.*, A57-A59) and agreement again seemed possible, in September the employer intentionally confused communication so that there could be no "meeting of the minds." See, *e.g.*, A64-A65. If, as the employer argues, there was merely misunderstanding, that misunderstanding could have been cleared up by simple requests for explanation, requests that the employer chose not to make. When explanation was offered, it was ignored.

When the final crisis approached, the employer communicated directly with the employees, telling them that the union was deceiving them about the status of the negotiations. A copy of the letter was not even sent to the union. See, *e.g.*, A70-A73.

The denouement, compelling the conclusion that the employer was "negotiating" to provoke a self-destructive strike rather than a contract, occurred in late October. By a letter to the employees on October 18, the employer advised that the union had *until October 28* in which to accept its "final offer." On October 24, four days before the deadline the employer itself had set, it issued another letter to the employees *and not to the union*, announcing that it was placing into effect, immediately and unilaterally, the terms of that offer. See, *e.g.*, A77-A80. A strike followed the next day.

To be sure, an employer has a legal right to grant an increase unilaterally *if good faith* negotiations have created an impasse. *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949). But if an impasse existed on October 24, 1966, it was not the result of good faith bar-

gaining by this employer. The very mechanics of the announcement reveal its true character as a device to disparage and undermine the union: (1) the employer never told the union it was going to take such action so that it would have an opportunity to agree to it in the face of its impendence, (2) the employer announced the increase to the employees without even sending the union a copy of the announcement letter, and (3) no impasse could have existed before the *October 28* deadline which the employer already had given, by which date the union could have accepted the "final offer."

It is hard to imagine conduct more calculated to undermine the union, more frustrating to negotiations, more surely resulting in a destructive strike, or in more damaging bad faith. It is evidence of the most substantial kind to support the basic NLRB conclusions.

The petitioner stresses, as it did before the Board, that many bargaining meetings were held and "concessions" were made. But meetings themselves can show merely that the employer is cleverly avoiding *per se* infirmities in its conduct. And concessions no more establish good faith than absence of concessions establishes bad faith. Further, in nearly every instance, the purported concessions represented either established practice at the Little Rock Kellwood operations, or changes which had been decided on and/or installed previously at all other plants of the Kellwood chain. Neither compels characterization as the fruit—or even significant evidence—of good faith bargaining.

2. The Petition Misrepresents Important Aspects of These Proceedings.

There are portions of the Petition for a Writ of Certiorari which go beyond customary legal advocacy.

For example, on page seven of the Petition, as part of its Statement of the Case, Kellwood asserts:

> The decision below concluded that, notwithstanding this lengthy and difficult series of first negotiations, which at one point had even resulted in a *bona fide* assumed final agreement, the Company had engaged in an overall pattern of bad faith bargaining.

The petitioner than "reasons," at page ten:

> The Eighth Circuit sanctions here a finding of bad faith, based solely on the failure to manifest "sincerity to work for an agreement," while concomitantly it finds a "good faith" acceptance of the other party's proposal.

Statements of the Trial Examiner about the "agreement" to which the Petition so refers include the following:

> Of a certainty, there was no meeting of the minds in New York, even for a split second . . . If there was any trickery, the entire record, including [Kellwood's] anti-union pre-election campaign, suggests that it was more apt to have come from the Company than the Union, in an effort to contrive seeming agreement on wages it knew the Union did not intend and which foreseeably would be repudiated by the Union; thus casting a shadow upon the Union's bargaining and putting itself in the clear of a bad-faith bargaining allegation. A64-A65.

The Court of Appeals dealt directly with the point.

> The examiner found the "acceptance" "was a bad-faith misunderstanding, contrived and thereafter used as a device to foul up and obstruct the bargaining process." The examiner's conclusion is challenged. *Assuming, solely for the sake of argument, there existed a good faith misunderstanding in the "acceptance" of the company, there are too many other factors which weigh against the company's contention of good faith bargaining.* A6. (Emphasis added.)

By no stretch of the imagination can these or other observations support assertions that a decision below concluded that there had been a "*bona fide* assumed final agreement."

A second example of (at least) misdirected argument is contained at page twelve, note nine, of the Petition. Kellwood there claims that although two Courts of Appeal held a particular wage increase not to be a violation of the Act, both the Board and the court below relied on that increase.

In fact, to the contrary, the Eighth Circuit previously had found the "timing, the content and the manner of [the same] wage increase announcement" by the employer to be a violation of Section 8(a)(1) of the Act. *Kellwood Co., Ottenheimer Division v. NLRB*, 411 F.2d 493 (8th Cir. 1969). In its decision in the instant case, at the pages cited by the Petition, the court does no more than discuss the same announcement. Thus it is deceptive, to say the least, to assert that the court below "stressed" the granting of an increase which had been found not to be a violation of the Act in other cases.

If such particulars in the Petition are inaccurate, its generalities are susceptible to the deepest suspicion.

Finally, an attempt to create a "conflict" among circuits coming to "different" conclusions about Section 8(a)(5) violations ignores the essentially factual nature of the determinations involved. Subsequent to the decision relied on by the petitioner, for example, the Fifth Circuit issued *Sweeney & Co. v. NLRB*, ... F.2d ..., 76 L.R.R.M. 2321 (5th Cir. 1971), one of a "plethora of judicial decisions" involving, "in final analysis, the motives of the parties manifested within the factual matrix of the bargaining process." *Id.*, at 2326. On a record evidently sim-

ilar to that at bar, the Fifth Circuit enforced the bargaining order based on an overall bad faith conclusion reached by the Board.

CONCLUSION

For the above reasons, it is respectfully urged that the Petition for a Writ of Certiorari be denied.

Respectfully submitted

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